KEVIN PETERSEN

STATE REPRESENTATIVE

Chair Williams and honorable members of the Committee on Property Rights;
Thank you for holding a hearing today on Assembly Bill 796 – Relating to the requirement to build and maintain partition fences.

State Statue 90.03 Partition fences; states:

The respective occupants of adjoining lands used and occupied for farming or grazing purposes, and the respective owners of adjoining lands when the lands of one of such owners is used and occupied for farming or grazing purposes, shall keep and maintain partition fences between their own and the adjoining premises in equal shares so long as either party continues to so occupy the lands, except that the occupants of the lands may agree to the use of markers instead of fences, and such fences shall be kept in good repair throughout the year unless the occupants of the lands on both sides otherwise mutually agree.

This statute was needed when it was written many years ago when most rural land owners (farmers) had cattle. In today's environment, when very few farmers pasture cattle along line fences, this statute appears to be very out dated.

In the towns of Union and DuPont, Waupaca County, we have a growing number of Amish moving into the District. They have moved onto farms with existing line fences. Abutting the Amish lands are several non-farming properties. In order to pasture their cattle, the Amish community residents recently began requesting several of their neighbors share the cost of building or replacing fences.

These neighbors do not have cattle and have no need for the fences. Many of them are elderly or widowed. Living on fixed incomes, they are already stressed in maintaining their day to day costs of living. The effects of an out of date State Statute only burdens them further. Why should any person be forced to share the cost of someone else's business? Should we then turn around and compel the farmers share their earnings with those that contributed to their fence?

Assembly Bill 796 narrows the applicability of the law relating to partition fences so that occupants of adjacent properties have equal responsibility to build and maintain a partition fence only if both adjacent properties are used for grazing or keeping livestock.

Thank you for your consideration – I will answer any question you may have at this time.

STATE CAPITOL: POST OFFICE BOX 8953 • MADISON, WISCONSIN 53708-8953
(608) 266-3794 • TOLL-FREE: (888) 947-0040 • FAX: (608) 282-3640 • Rep.Petersen@legis.wi.gov

Wisconsin Woodland Owners Association, Inc.

P.O. Box 285, Stevens Point, WI 54481-0285

www.wisconsinwoodlands.org

February 20, 2008

Assembly Committee on Property Rights
State Capitol, Madison, WI

Representative Williams and Assembly Committee on Property Rights members,

The Wisconsin Woodland Owners Association or WWOA, representing Wisconsin's private woodland owners provides the following comments for your consideration at this public hearing regarding AB 796.

WWOA supports the changes proposed in AB 796 for the following reasons.

Current fencing statutes are outdated considering the significant changes that have occurred over the rural landscape of Wisconsin. Rural land owners are no longer only farmers or ranchers. Many citizens have purchased or inherited rural lands which are being used for woodland management, recreational use, or home sites. These resulting changes in ownership necessitate changes in laws which no longer serve the purpose for which they were created.

Landowners choosing to graze or farm with animals receive the full benefit of having their land fenced to protect their assets. Adjoining landowners who do not own farm animals do not receive income when the animals or animal products are sold nor do they qualify for any state or federal programs to assist farmers in their businesses.

Fencing is an expensive yet necessary part of animal farming. However, it is unreasonable for a farmer or rancher to present a bill to an adjoining landowner who does not receive a financial benefit from that expense. Woodland owners do not present bills to their neighbors when they plant trees yet neighbors enjoy the benefits of those trees through beautiful landscapes, sustainably managed production of wood for building homes and other structures, wildlife habitat, and clean air and water.

WWOA members thank you for listening to our reasons for supporting changes to the fencing laws. We hope you will support these changes which are reasonable and better reflect the current land use practices in rural Wisconsin.

Merlin Becker
WWOA President

Wisconsin Towns Association

Richard J. Stadelman, Exec. Director
W7686 County Road MMM
Shawano, Wis. 54166

Tel. (715) 526-3157
Fax. (715) 524-3917
Email: wtowns@frontiernet.net

To: Assembly Committee on Property Rights
From: Rick Stadelman, Executive Director
Re: AB 796 Partition Fences
Date: February 20, 2008

On behalf of Wisconsin Towns Association, I respectfully request that AB 796 not be passed. AB 796 would change the current responsibility to build and maintain a partition (line) fence between properties if one or both of the occupants use the property for farming or grazing. This bill would place the burden solely on the property owner who is using their land for farming or grazing if the other adjoining property owner is not using their land for farming or grazing. However, the partition fence provides benefit to both property owners regardless whether both are farming or grazing.

Towns are involved in this issue because the town board serves as fence viewers. AB 796 raises many questions that will put town boards in the middle of possible disputes. For example, if in 2008 property owner A is using his/her land for farming or grazing, but the adjoining property owner B is not, property owner A will be responsible for building the entire partition (line) fence. What if property owner B uses his/her land in 2009 for farming or grazing, does property owner B have to reimburse property owner A for a portion of the line fence built in 2008?

It must be remembered that line fences keep animals out as well as keeping animals confined. Good line fences (properly built on the property line) establish a definitive boundary between property owners reducing boundary conflicts. There is good reason Robert Frost wrote in his poem "Mending Wall", ***"Good fences make good neighbors."***

Therefore, because we believe that AB 796 will raise more questions which will put town fence viewers in the middle of property owner disputes about line fences we ask that the bill not be passed. Thank you for your consideration.

Mary Lazich

Wisconsin State Senator
Senate District 28

Testimony of Senator Mary Lazich
On 2007 Assembly Bill 796
Assembly Committee on Property Rights
February 20, 2008

Good morning, Committee Chairman Williams and committee members. Thank you for the opportunity to provide testimony to the Assembly Committee on Property Rights about Assembly Bill 796.

Assembly Bill 796 addresses a century old problem brought to my attention by a constituent. Mark Minta owns property in Rusk County and does not own livestock. His adjoining neighbor owns livestock and required Mark to repair or replace the fence that separates their land.

Under current Wisconsin law, as long as at least one of the occupants of adjoining lands uses the land for farming or grazing, the landowners must maintain a separating fence or markers. The occupants of adjacent properties have equal responsibility to build and maintain a partition fence even though only one property owner uses his or her land for farming or grazing.

Assembly Bill 796 updates the law by changing the statutes so that both neighbors can be required to build and maintain a partition fence only if ***both*** adjoining properties are used for grazing or keeping livestock. This bill brings Wisconsin's fence law into the twenty-first century.

State Capitol • PO Box 7882 • Madison, WI 53707-7882 • 1-800-334-1442 • 608-266-5400 • 608-267-6790 fax
Email: sen.lazich@legis.state.wi.us Web: http://www.legis.state.wi.us/senate/sen28/news/

When current law was instituted in the 1800's, it was practical for the time. State governments in the Midwest reasoned that property owners on both sides of the fence would benefit from a fence separating their properties by preventing the destruction of one landowner's crops or property by their neighbors' livestock. I submit that the 1800's are long over, and we now live in the 21st Century. My constituent is just one of many, many examples of rural landowners owning their land for purposes other than livestock.

Assembly Bill 796 is common sense legislation that makes the appropriate change to bring statutes up to date. Requiring owners of adjoining land to have mutual responsibility for a partition fence should apply to both parties only in the event they both own livestock, and both have a need for the fence.

To: Chairwoman Representative Williams
Cc: The Members of the Assembly Committee on Property Rights

I am writing asking for your support of AB 796 amending the fence law dating back to the 1800's when times were different.

I became aware of this law approximately two years ago when contacted by a neighbor of our recreational property in Rusk county. While there had been a fence between our properties it had been in disrepair since we purchased the property in 1993.The neighbor had always raised cattle and horses but the creek level must have kept them on their property. With a dry year they were crossing over and getting out on the road and that is how we came to find that we were responsible for keeping his cattle in his pasture and out of our woods. After much hemming and hawing and deliberation we put in approximately 1/4 mile of fence through woods, swamp and muck. Not much fun and not inexpensive either.

I'm sure when this law was written it made more sense as most landowners probably used the land for grazing or raising livestock. Times have changed and so has land use. Please vote in favor of changing the current fence law so that those who choose to raise livestock are responsible for fencing their livestock.

Thank You
Mark Minta
N9302 Stone School Rd
Mukwonago Wi 53149
262-366-4440

Wisconsin Farm Bureau Federation

1241 John Q. Hammons Dr. PO Box 5550, Madison, WI 53705 1-800-261-FARM 608-836-5575 www.wfbf.com

February 20, 2008

TO: **Members of the Assembly Committee on Property Rights**

FROM: **Casey Langan, Director, Public Relations**

RE: **Oppose AB 796 – Revision to partition fence law**

The Wisconsin Farm Bureau Federation opposes AB 796 and requests that you oppose it as well.

Farm Bureau policy adopted at our 88th annual meeting in December fully supports the state's current fence law.

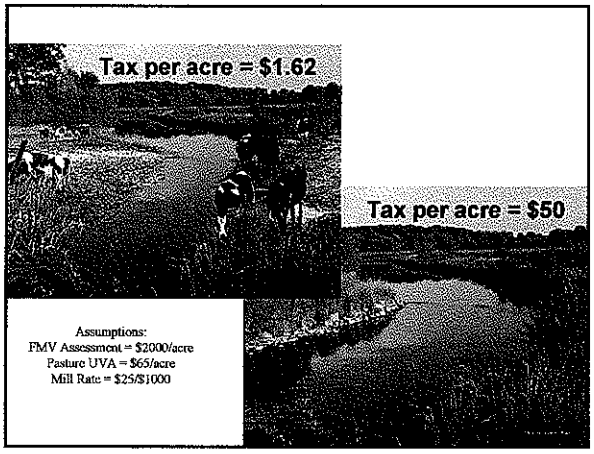
The old saying that "Good fences make good neighbors" rings as true in 2008 as ever.

Farm Bureau's livestock and crop producer members do not see the need to narrow the applicability of this law to just cases where livestock may be housed on both sides of a partition fence.

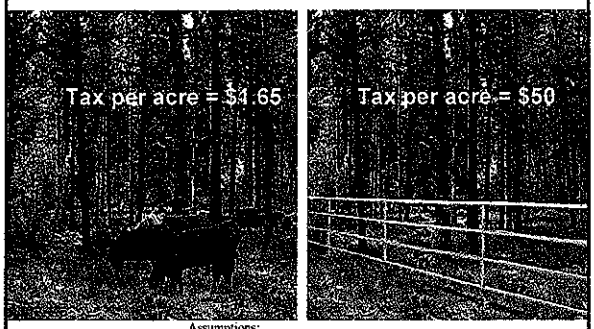
When this bill has come up before, several questions have been asked. What would happen if a farmer puts up a quarter mile fence, totally at his expense, and a year later a neighbor decides that since there's already a fence in place, he wants to have animals on his land too? Should the neighbor be responsible for reimbursing the farmer for part of the cost of the new fence? Would the neighbor have discretion over the type of fence being erected if he was not paying for any of it? What would happen in he didn't like the way it looked?

There is more than one purpose for having a fence between properties. There is also some value to both parties when a fence provides a barrier between neighbors' land. Fences on our rural landscape provide appropriate land division markers. Specifically, Farm Bureau has concerns about the adverse possession and trespassing conflicts that may occur between neighboring landowners if a law that ensures equal responsibility to build and maintain a partition fence is erased.

Again, the WFBF asks for your opposition to AB 796.



Pastured Woodlands



Assumptions:
FMV Assessment = $2000/acre
Pasture UVA = $65/acre
Mill Rate = $25/$1000

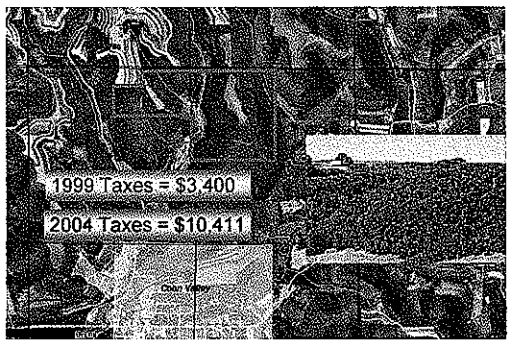
36 Acre Parcel on Madison's West Side

(FMV = $3,200,000)
Taxes at current use value assessment = $180 total/yr
Taxes at Fair Market Value = $68,000/yr

Penalty for Conversion out of Ag Use to Residential, Commercial or Industrial = $6,500

310 Acre Conservation Farm

Near Coon Valley, Vernon County



February 20, 2008

Materials submitted by James Sorenson to the Property Rights Committee for the public hearing on AB 796.

1. **Copy of statement made at the hearing.**

2. **Photographs of locations where we are required by the current fence law to provide fences for our neighbor's livestock.**

3. **Copy of an article written by me and published in Woodland Management on fence law activities in other states.**

4. **Copy of an article by James Malloy and Linda Reid (UW-Whitewater) on constitutional issues involving forced-contribution fence laws.**

February 20, 2008

Assembly Committee on Property Rights
State Capitol, Madison, WI

Representative Williams and Members of the Assembly Committee on Property Rights,

My name is Jim Sorenson. I live in Madison and my wife, Lucy, and I are owners of an 80-acre woodlot in Grant County. We are managing the property for timber production and also use it for recreational purposes.

As owners of rural property, we have been directly impacted by the Wisconsin fence law. We neither need nor want fences, but have been required to spend thousands of dollars on fence construction because of it. Our family also spends many hours each year performing hard labor to maintain them. The documents that I submitted include photos of locations where we are required to provide and maintain a fence. These are not atypical locations on our property or on many other woodlots.

Fences are of no practical use to us. We receive no financial return for our substantial investments of time, money and effort. They are solely for the benefit of our neighboring livestock owner. Fences are an ordinary expense of pasturing livestock. I know of no other situation in Wisconsin where a property owner must pay expenses and provide hard labor for the direct benefit of his neighbor's business activities.

Because of my dissatisfaction with Wisconsin's law, I have done some research on fence laws. I will not have time to discuss all of my findings, but will summarize some highlights for you.

The first point is that forced-contribution fence laws are not a sacred tradition. Under English common law, which is the basis for most of the laws in this country, the livestock owner was strictly responsible for controlling his animals. That principle was applied in the first settlements along our eastern seaboard.

As settlements spread inland, livestock were commonly released into open fields and woodlands, and so-called open-range laws were adopted. However, that principle became obsolete as the open areas became occupied and fenced in. That, in turn, led to the development of shared fence laws in most eastern and midwestern states.

This concept made sense when the country was first being fenced in, and virtually all landowners were farmers who could be expected to own livestock. However, those conditions no longer exist. The majority of rural landowners in Wisconsin no longer are farmers. Many farmers do not pasture livestock. Some are involved only in crop farming. Furthermore, an attempt to reform Wisconsin's fence law in 1991 actually was instigated by dairy farmers. They no longer pastured their cows, but were required to maintain fences for the benefit of neighbors who were hobby farmers, horse owners, and the like.

An additional confounding factor is that many rural landowners who are not farmers now pasture livestock on their property to obtain low agricultural-use property tax rates. These landowners gain substantial tax benefits, while their neighbor gets a fence bill. This only adds to the basic unfairness of the fence law.

The simple fact is that Wisconsin's antiquated fence law no longer fits the changing pattern of rural land ownership and usage in our state. The law benefits only those landowners who pasture livestock, while creating an additional burden of hard labor and expense for those who do not.

Other states have recognized the fundamental unfairness of forced-contribution fence laws and have reformed their laws so that only livestock owners are responsible for maintaining fences. I included an article that I wrote on this topic in the materials that I submitted to the committee. States that have voluntarily reformed their laws include Michigan in 1978, Missouri in 2001 and Virginia in 2005.

Forced-contribution fence laws also have been attacked on constitutional grounds. I have provided copies of an article on this topic by James Molloy and Linda Reid, who are on the faculty at the University of Wisconsin-Whitewater. Here, the results have been somewhat mixed.

State courts in Ohio, Iowa and Minnesota ruled that their laws were constitutional. These rulings were based primarily on the 10th amendment of the U.S. Constitution, the so-called states' rights amendment, which allows states to enact laws that are perceived to be in the public interest.

However, courts in Vermont, New York and Pennsylvania ruled otherwise. Their rulings were based primarily on the 5th and 14th amendments, which protects citizens from the taking of their property without just compensation. These courts specifically rejected the argument that forced-contribution fence laws were in the public interest, when they are so obviously for the benefit of one party, namely the livestock owner.

To this I might add the 13th amendment, which forbids involuntary servitude. The many hours of hard labor that we spend maintaining fences to control our neighbors' livestock are not voluntary. They are done solely to comply with the demands of the fence law.

In the end, it boils down to a dispute over states' rights versus civil rights. (Where have we encountered that argument before...?) Personally, I will side with civil rights over states' rights. I find the following statement of the Vermont court to be particularly compelling:

"As a result of changing land use patterns, the law more and more often applies to landowners without livestock. In such situations, the fence law is burdensome, arbitrary and confiscatory, and therefore cannot pass constitutional muster."

Reid and Malloy also comment:

"The New York and Vermont cases cited herein appear to confront the changing face of rural America, while the other court decisions discussed seem to cling to an out-of-date view of our rural environment..."

I firmly believe that Wisconsin's forced-contribution fence law cannot stand, and eventually will be removed from the books. I strongly encourage this committee to play a leadership role in this reform by supporting AB 796.

Thank you for your attention and for allowing me to present my opinions to the committee.

James A. Sorenson
3541 Mammoth Trail
Madison, WI 53719
jasorens@facstaff.wisc.edu

TYPICAL LOCATIONS ON OUR WOODLOT WHERE WE ARE REQUIRED BY THE FENCE LAW TO PROVIDE AND MAINTAIN FENCES FOR OUR NEIGHBOR'S LIVESTOCK. (SUBMITTED BY JAMES SORENSON, MADISON)

Fence Law Activities in Other States

In 2002, I submitted a letter to Woodland Management, critiquing Wisconsin's archaic fence law (also known as Statute 90). The letter was published in the Winter-Spring 2002-2003 issue. The response that I received from readers of Woodland Management was entirely positive.

This law, which dates from the 19th century, requires that adjoining rural property owners share equal responsibility for the cost and maintenance of a fence, suitable for control of livestock, whenever *either* of the landowners uses his property for farming or pasturing livestock. Costs can easily run into thousands of dollars and impose a burden of many hours of hard labor each year on woodlot owners who otherwise neither need nor want a fence.

During the past legislative session, Sen. Alberta Darling (R-River Hills) announced plans to consider reform of this law. Her efforts attracted bipartisan support. Rep. Terese Berceau (D - Madison) was among those who expressed interest in co-sponsoring such legislation. Although legislation has been stalled for the moment, it is not a dead issue. Other states have gone through similar delays before eventually achieving reform of their fence laws. In this article, I will summarize some recent (since ~1970) activities involving fence laws in other states, based on information that I obtained from various websites.

Constitutional Challenges

Constitutional challenges have been made in at least six states to fence laws that mandate "forced contributions" for providing and maintaining fences. In all of these cases, the initial demand for a fence came from a party who wanted to run livestock on his property, against a neighboring landowner who had no need for a fence.

The supreme courts of two states have ruled such laws to be constitutional: Ohio in 1969, and Iowa in 1995. The Iowa court reaffirmed its ruling in a second case in 2001. The courts in these cases ruled that the laws were constitutional under the "police powers" granted to states by the 10th amendment of the U.S. Constitution to enact laws for the "public good", even when the "benefits" of the law accrued primarily to one party, namely, the livestock owner.

The supreme courts in three other states have ruled otherwise: New York in 1972, Vermont in 1989 and Pennsylvania in 1997. These courts specifically rejected arguments that the laws were justified to achieve a "public good", when they were obviously designed for the benefit of only one party, namely, the livestock owner. This, they decided, amounted to an unconstitutional of taking of property without just compensation, in violation of the 5th and 14th amendments of the U.S. Constitution and similar clauses in their state constitutions. (To this I might add the 13th amendment, which forbids "involuntary servitude". All of the forced-contribution laws require not only that a neighboring landowner build or pay for a fence, but that they also provide the hard labor required to maintain it in a condition suitable for livestock control.)

Meanwhile, lower courts in Minnesota have come down on both sides of the issue. A

district court in 1982 ruled that their law was not constitutional, whereas a Court of Appeals in 2001 ruled that it was.

Thus, court decisions involving fence laws have pitted the "police power" granted to states to enact laws for the "public good" by the 10th amendment ("states' rights"), against the rights of individual citizens to "due process" guaranteed by the 5th and 14th amendments ("civil rights"). Arguments that forced contributions are justified for the public good, when they are obviously for the benefit of only one of the landowners, are wearing thin. It seems likely that there will be more challenges and that additional state laws will fail to pass constitutional muster.

Courts That Have Not Enforced the Law

In at least two cases, state supreme courts have refused to enforce the requirement that a neighboring landowner pay a share of the cost for a boundary fence. Illinois law states that costs are to be apportioned in "just shares". One small landowner was given a bill by his neighbor for his share of a boundary fence, but refused to pay. The case made its way to the Illinois Supreme Court, who decided that the small landowner's "just share" was zero.

In the Kansas case, in spite of the apparent requirement of Kansas fence law for equally shared costs, the fence viewers (members of the county board) decided that the neighbor who had no need for a fence was not required to contribute to its cost. The Kansas Supreme Court sided with the fence viewers. The Court's reasoning was that the fence law gave final authority for resolving disputes to the fence viewers, regardless of whatever else the law said.

The Illinois and Kansas cases did not directly challenge the constitutionality of forced-contribution fence laws. However, one can reasonably assume that neither of these state courts were sympathetic to the requirement for a forced contribution by a landowner who neither needed nor wanted a fence.

Legislative Reforms of Fence Laws

Legislatures in at least three states have reformed and modernized their fence laws to eliminate forced contributions without being required to do so by the courts: Michigan in 1978, Missouri in 2001 and Virginia in 2005.

The Missouri law was changed after some 20 years of efforts by advocates of fence law reform. The change in Virginia law also required years of effort. According to news reports in the February 3, 2005 issue of the Richmond Times-Dispatch, the process was accelerated by tragic outcome of a "fence-law feud" between two neighboring landowners. It seems that one of the landowners had refused for years to pay his share of the cost of a boundary fence. When court costs and related fees were taken into account, the amount being demanded was something like $45,000. The feud eventually escalated from words to firearms, and the landowner who refused to pay was fatally wounded in their final confrontation. That was enough to convince the Virginia legislature that it was time to update their 17th century fence law.

I did not learn the history of the reformed Michigan law (also known as Act 34 of 1978); however, it is a model of simplicity and fairness. Put simply, it says:

1. If you need a fence, put one up.

2. If you put one up, you must pay for and maintain it.

3. If your neighbor begins to use the fence for livestock control, he or she must pay for a proportionate share of its value and assume a proportionate share of maintenance responsibilities. Alternatively, he or she can put up their own fence, which in some cases may be more suitable to their needs.

4. If you can't agree on proportionate shares, call in the fence viewers. This is the same procedure that would be followed under current Wisconsin law, and in most other states.

Significantly, the reformed Michigan law was passed with the support of the Michigan Department of Agriculture, the Michigan Department of Natural Resources, the Michigan Farm Bureau, and the Michigan Townships Association. It certainly would pass any constitutional test. Indeed, it is so simple, straightforward and fair that it is difficult to understand why it hasn't been enacted as "the law of the land."

It is likely that legislation has been and/or will be considered to reform the fence laws of other states as well. These reforms will be supported by both farming and non-farming landowners. Indeed, a failed effort to change Wisconsin law in 1991 actually was introduced at the request of dairy farmers who no longer pastured their cows, but were required to maintain fences for their neighbors who were hobby farmers, horse owners, etc. These situations will become more frequent with increasing levels of crop farming, e.g., large-scale growing of corn for ethanol production. Another interesting point is that two of the court decisions that upheld state fence laws did not even involve traditional farming practices. One of the cases in Iowa involved miniature horses, and one in Minnesota involved a deer farm.

Summary

Forced-contribution fence laws are neither sacred nor invulnerable. They have been overturned by courts or voluntarily changed by legislatures in at least six other states. If meaningful reform is to be achieved in Wisconsin, it is essential that rural landowners who support this change contact their legislators and inform them of their support for this reform.

About the author

James Sorenson is the owner of an 80-acre woodlot in Grant County. A list of the websites that were the basis for this article can be obtained by contacting him at jasorens@facstaff.wisc.edu.

A research project from The National Center for Agricultural Law Research and Information
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An Agricultural Law Research Article

The Constitutionality of Partition Fence Statutes in the Midwest

by

James L. Molloy
and
Linda A. Reid

August, 2004

www.NationalAgLawCenter.org

A National AgLaw Center Research Article

The Constitutionality of Partition Fence Statutes in the Midwest

James L. Molloy[1]
Linda A. Reid[2]

I. Introduction

Fence law deals with the regulation of boundaries and fence disputes. Typically, laws in this category prescribe when a fence is required, what a legal fence is, how responsibility for a fence is divided, and how to resolve disputes between property owners. A primary area of fence law concerns the rights and duties of landowners on adjoining properties to jointly erect and maintain partition fences. A "partition" or "line" fence is a fence on or very near the boundary line separating adjoining properties. Numerous states statutorily require landowners of adjoining rural properties to erect and maintain partition fences between their properties. Generally, these statutes contain a "forced-contribution" or "cost-share" component that requires the adjoining landowners to share the cost of erecting and maintaining the partition fence.

In certain states, the forced-contribution component exists even where the partition fence is not statutorily required and only one landowner wishes to enclose his property. When one landowner properly requests that an adjoining landowner share in the cost of the erection and/or maintenance of a partition fence, the adjoining landowner is required to do so.

Frequently, partition fence statutes are enforced by "fence viewers," typically local government officials or appointees.[3] If a dispute arises, the fence viewers examine the situation and allocate responsibility for these types of fences. Generally, each landowner is responsible for his "fare share" of the cost.[4]

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[1] Associate Professor of Business Law, College of Business and Economics, University of Wisconsin-Whitewater.

[2] Assistant Professor of Business Law, College of Business and Economics, University of Wisconsin-Whitewater.

[3] In Wisconsin, for example, town supervisors, city aldermen, or village trustees. WIS. STAT. § 90.01.

[4] In most states, the "right-hand rule" applies. Each landowner stands in the middle of the boundary line and faces the fence (or where the fence is planned to be constructed), and each is responsible for the construction and maintenance of the portion of the fence to his right. If the division is unfair due to water gaps, gullies, etc., the landowners, with the aid of fence viewers, if necessary, can agree to a different division.

Under most Midwestern states' statutory schemes, adjoining landowners are generally required to jointly maintain partition fences. If one of these persons fails to build or maintain his share of the fence, the aggrieved landowner may complain to the fence viewers. If the fence viewers determine the fence has not been properly built or maintained, they direct the delinquent landowner to build or repair the fence within a reasonable time. If the delinquent party does not do so, the aggrieved party may complete the construction or repairs and recover the expense by having the fence viewers determine the expense of building or fixing the fence. The aggrieved party can then seek payment from the delinquent party. If the delinquent owner does not pay, the aggrieved party can file a certificate of the fence viewers' determination with the appropriate local government official (in many cases, a town clerk) and receive payment from the local government treasury, which recoups the payment through a tax lien on the delinquent party's property.

Partition fence statutes are applicable only in rural areas where, historically, land was used primarily for the purpose of raising livestock or crops. This paper surveys the partition fence statutes currently in place in the Midwest where, over time, the use of rural property has evolved from exclusively agricultural to more often residential. This paper further explores the current constitutionality of those statutory schemes in light of the changed nature of rural land use since their enactment.

II. Examples

In certain circumstances, partition fence statutes make sense. Consider the following examples:

> Example 1:
>
> Neighbor A and Neighbor B each own ten acres of adjoining rural property. Both decide to raise livestock[5] on their respective properties. Some states' partition fence statutes require that A and B share equally in the cost of erecting and maintaining the fence separating their properties. For the purpose of this paper, these statutory schemes are labeled "livestock provisions."
>
> Example 2:
>
> Neighbor A and Neighbor B each own ten acres of adjoining property. A decides to raise cattle. B decides to raise crops (or even use the land for a non-agricultural purpose). Some states' partition fence statutes require that A and B share equally the cost of erecting and maintaining the fence

[5] For the purposes of this paper, "livestock" is broadly defined to include cattle, horses, mules, swine, sheep, and goats. Some Midwestern states also include farm deer, ostrich, rheas, emus, and other poultry.

separating A's cattle from B's property. This is another example of a livestock provision statute.

But what if only one of the neighbors wants or needs the fence? Should the other neighbor be required to pay half the cost of having it erected and maintained? Consider these examples:

Example 3:

Neighbor A and Neighbor B each own ten acres of adjoining property. A decides to use his property to grow pine trees for sale to the public at Christmas. B decides to use his land to grow apple trees for sale to the local grocer. A wants a fence; B does not. In some states, B will be required to pay half the cost of erecting and maintaining the fence that separates A's pine trees from B's apple trees, despite the fact that there is no livestock on either side of the fence. For the purpose of this article, this is an example of an "agricultural use" provision.

Example 4:

Neighbor A and Neighbor B each own ten acres of adjoining property. A decides to raise wheat on his property. B decides to build a log cabin but otherwise keep it as "natural" as possible. A wants a fence; B does not. In some states, B will be required to pay half the cost of erecting and maintaining the portion of the fence that separates A's cropland from B's property, despite the fact that A has no livestock to fence in and that B's property is not used for any agricultural purpose. This is another example of an agricultural use provision.

Example 5:

Neighbor A and Neighbor B each own ten acres of adjoining property. Both have a home on their properties, but neither plans to use the property for any type of agricultural purpose. A wants a fence; B does not. In some states, B will be compelled to pay for half the cost of erecting and maintaining the fence that divides the properties, regardless of the type of use of the property by either landowner. For the purpose of this paper, these types of statutory schemes are labeled "without regard to use provisions."

III. History of Partition Fence Statutes

Under the common law of England, a landowner had a duty to fence in his livestock and restrain them from running at large. He was strictly liable for injury to his neighbors or

damage to their property caused by his roaming animals.[6] This "fencing-in" theory was brought to the United States and adopted in many of the colonial states.[7]

In less populated westerly states, a "fencing-out" or "open range" policy was embraced.[8] There, a livestock owner had no legal duty to fence in his property. Any land not enclosed by a fence was considered open to livestock. A neighboring landowner had no cause of action for damage caused by the grazing stock.[9] In effect, neighbors in fencing-out states had the options of doing nothing and risking the harm from trespassing animals or incurring the expense of building a fence.

Historically, most Midwestern states were open-range states. In the late 1700s and early 1800s, as their populations increased states reversed their open-range laws and began to adopt and statutorily articulate fencing-in policies. In many Midwestern states, unlike under the common law statutes, owners of livestock could be held liable only if the livestock trespassed on neighboring property because of the livestock owner's negligence. States also supplemented their fencing-in statutes with "partition" or "line" fence provisions requiring forced contribution. States reasoned that because the property owners on both sides benefited from the partition fence, ergo protection from destruction of their crops and property by their neighbors' livestock, both landowners should be required to share the cost of erecting and maintaining the fence.[10]

Most of the Midwest partition statutes currently in effect have not meaningfully changed from the time of their enactment in the 1800s. Although the statutes apply only in "rural" areas, over time the use of rural land has significantly evolved from exclusively agricultural to more residential. Even though the land use has evolved, the statutes have not.

According to a recent United States Department of Agriculture publication,[11] the average annual rate of increase in non-farm, rural residential use of property in the United States has been approximately 1.2 million acres per year since 1980.[12] According to the U.S.

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[6] 73 Eng. Rep. 22-23 (1592), reprinted in 3 DYER 372b (1907).

[7] *See* John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252, 1263-64 (1996).

[8] *See* Terence J. Centner, *Reforming Outdated Fence Law Provision: Good Fences Make Good Neighbors Only if They are Fair*, 12 J. ENVTL. L. & LIT., 267, 266-69 (1997).

[9] *Id.*

[10] Note, The Iowa Fencing Laws, 7 IOWA L. BULL., 176, 176-177 (1922).

[11] Marlow Vesterby & Kenneth S. Krupa, U.S. Department of Agriculture, *Major Uses of Land in the United States, 1997 (*Statistical Bulletin No. 973, Aug. 2001). Unfortunately for the authors of this article, the "rural residential" classification is fairly new and information concerning it is not available by state.

[12] *Id.* at 22.

Census Bureau, from 1952 to 2002, the total amount of land in the Midwest[13] used as farm land has declined from 404,000,000 acres to 352,100,000 acres and the total number of farms from 1,827,100 to 802,000.[14] The result has been fewer and larger farms, and an overall increased amount of adjoining non-farming residential use of property in traditionally rural areas. Despite these trends, many Midwestern partition fence statutory schemes require the fences, and/or forced-contribution, regardless of whether livestock and/or crops are raised on one or both of the properties.

It is noteworthy that the cost of fencing is substantial. Currently in Wisconsin, for example, the cost of constructing a three-strand barbed wire fence in an agricultural environment runs about $5-$10 per foot for clearing and construction.[15] On a forty acre-square parcel, each side being ¼ mile long, the cost of a partition fence on the boundary of the property would average between $6,600 and $13,200 per side.

IV. Constitutional Considerations

Because partition fence provisions can place obligations upon unwilling landowners, there have been several challenges to these laws as unconstitutional deprivations of property under the 5th and 14th Amendments of the United States Constitution and various similar provisions in state constitutions. Another challenge has been whether a state has properly exercised its police powers.

A. Understanding Police Power

Police power is defined as the authority conferred by the Tenth Amendment to the United States Constitution

> upon the individual states, and, in turn, delegated to local governments, through which they are enabled to establish a special department of police, adopt such laws and regulations as tend to prevent the commission of fraud and crime, and secure generally the comfort, safety, morals, health, and prosperity of the citizens by preserving the public order, preventing a conflict of rights in the common intercourse of the citizens, and insuring to each an uninterrupted enjoyment of all the privileges conferred upon him or her by the general laws.[16]

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[13] For the purposes of this article, the authors include as Midwestern states those states that the U.S. Census Bureau includes in its Midwest region, specifically and in alphabetical order, Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, North Dakota, Ohio, South Dakota, and Wisconsin.

[14] UNITED STATES DEPARTMENT OF AGRICULTURE, NATIONAL AGRICULTURE STATISTICS SERVICE, 2002 CENSUS OF AGRICULTURE, *available at* http://www.nass.usda.gov:81/ipedb/ (as summarized in Appendix A).

[15] Based on estimates procured by authors from Madison, Wisconsin, fencing companies.

[16] BLACK'S LAW DICTIONARY 1156 (6th ed.).

In layman's terms, it is the power of the state to place restraints on the personal freedom and property rights of persons for the protection of the public safety, health, and morals, or the promotion of the public convenience and general prosperity.

A state's police power is not without limitations. It is subject to the restrictions of federal and state constitutions. For a state statute to pass constitutional muster, it must pass a two-prong test. The United States Supreme Court put it this way in *Lawton v. Steele*:[17]

> [T]he state may interfere wherever the public interests demand it, and in this particular a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests. To justify the state in thus interposing its authority on behalf of the public, it must appear first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of that purpose, and not unduly oppressive upon individuals.[18]

Those who challenge the constitutionality of partition fence laws must also contend with the legal principle that state statutes are presumed to be constitutional and should be declared unconstitutional only with extreme caution and only when absolutely necessary.[19]

To determine whether the state's authority to enact and enforce partition fence laws is beyond the scope of their police powers, the first prong of the above-mentioned *Lawton* test requires courts to assess whether the laws serve the public generally. Courts have found a variety of potential societal/individual benefits that could be used to justify the exercise of their police powers, including freedom from unwanted intrusion by a neighbor's cattle, freedom from trespassing neighbors and an increase in privacy, diminution of lawsuits arising out of damage caused by straying cows, and discouragement of litigation by clearly marking the boundaries of rural lands.[20] Moreover, a law may serve the public purpose even though it benefits certain individuals more than others.[21]

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[17] 152 U.S. 133 (1894).

[18] *Id.* at 136-37 (citations omitted).

[19] *See, e.g.*, In re Bailey, 626 N.W.2d 190 (Minn. App. 2001) (citing In re Haggerty, 448 N.W.2d. 363 (Minn. 1989)).

[20] Gravert v. Nebergall, 539 N.W. 2d 184, 188 (Iowa 1995).

[21] John R. Grubb, Inc. v. Iowa Hous. Fin. Auth., 255 N.W.2d 89, 95 (Iowa 1977) (citing Richards v. City of Muscatine, 237 N.W.2d 48, 60 (Iowa 1975)).

The second prong of the *Lawton* test requires courts to determine whether the statute is reasonably necessary to the accomplishment of the stated public purpose and whether it is unduly oppressive. "Courts widely defer to legislative judgment: the government need not employ the least restrictive means when exercising its police powers, but rather 'a means narrowly tailored to achieve the desired objective.'"[22] Further, "the single fact that a party must make substantial expenditures to comply with a regulatory statute does not render the statute unconstitutional."[23]

B. Illustrative Cases

Court challenges to the application of partition fence statutes have been, for the most part, based upon police power arguments: the reasonableness of the fence provision to the alleged public good; the continued legitimacy of the public purpose; or the appropriateness of the means selected by the legislature.[24] These statutes have been found facially constitutionally valid; the question is whether they are valid as applied under specific factual circumstances.

Forced share statutory provisions have been challenged with mixed results. In some states that have addressed the issue, courts have held that the social benefit of protecting the citizenry, along with minimal benefit to the landowner, was sufficient to justify the burden of the duty on an individual landowner to pay the cost of erecting and maintaining a portion of the partition fence. In other states, courts have held that the statutes were unconstitutional as applied to certain landowners, especially those not involved in farming activities, because the partition fence did not confer sufficient benefit on the individual landowner to justify the burden of the duty to erect and maintain the fence.

1. Statutes Held Valid As Applied

An Ohio court considered the state's partition fence statute in *Kloeppel v. Putnam,*[25] and found no constitutional violation. Kloeppel owned a 40-acre grain farm. Kloeppel's neighbor, Mox, requested a partition fence to be erected and asked the local fence viewers to visit the property and assign to him and Kloeppel an equal share of the fence. Over the objection of Kloeppel, the trustees did so and ordered Mox and Kloeppel each to build one-half of the fence.

When Kloeppel refused to comply with the order, the township trustees had the fence built by the lowest bidder. Kloeppel was charged for the expense via a tax, and after

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[22] Board of Trustees v. Fox, 492 U.S. 469, 480 (1989).

[23] Northwestern Laundry v. City of Des Moines, 239 U.S. 486, 492 (1916).

[24] Terence J. Centner, *Reforming Outdated Fence Law Provision: Good Fences Make Good Neighbors Only if They are Fair*, 12 J. ENVTL. L. & LIT., 267, 299 (1997).

[25] 63 N.E.2d 237 (Ohio Ct. App. 1945).

being threatened with a tax lien, sought judicial relief. The trial court found in favor of Putman, the Van Wert County treasurer, and dismissed Kloeppel's petition.

Kloeppel's two-pronged contention on appeal was that (1) because of the nature of the current and future use of her land, she derived no benefit from the construction of the fence, and (2) because she received no benefit from the construction of the fence, the assessment came within the constitutional inhibition forbidding the taking of private property for public use without compensation.[26]

The Court of Appeals of Ohio upheld the trial court's decision, distinguishing the facts in Kloeppel's case from those in *Alma Coal Company v. Cozad*,[27] which involved a "wild" and "uncultivated" parcel of property. In that case, a coal company was assessed for the construction of a partition fence on their property; however, the order was subsequently overturned upon appeal. The Kloeppel court noted that:

> [T]he [Alma] court did not hold the statutes, relating to the construction of partition fences, which are similar to the statutes now in effect relating to the same subject matter, were unconstitutional but simply denied the right to invoke their application to a situation such as was found in that case. The situation found in that case was that the lands of the coal company, which were assessed for the construction of a partition fence, were wild, uncultivated and unfenced, that the company had no intention to improve, fence or cultivate any portion of them, and that the fence could be of no value to it whatsoever and inured to the sole benefit of the adjoining proprietor.
>
> The court, in its opinion, stated further that in that case there could be no compulsion, under the police power, to build the fence or contribute to the cost of it because there was no such use of the coal company's property as to indicate probable injury to its neighbors or the community in the absence of a fence.[28]

In contrast, the court held that in Kloeppel's case, since her land was cultivated, it was undeniable that a fence benefited it. Citing *Jennings v. Nelson*,[29] a case involving a cropland and land on which livestock was raised, the court continued:

> If land is cultivated, or to be cultivated, no one can deny that a fence is beneficial to it. A fence which partially encloses cultivated land is beneficial to some extent. If it encloses the field adjoining, it will prevent injury from stock in that field. Even if it does not enclose such field it will

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[26] *Id.* at 238.

[27] 87 N.E. 172 (Ohio 1909).

[28] 63 N.E.2d at 238, 239.

[29] 15 Ohio App. 395 (1921).

> prevent in some degree encroachment by stock kept on the other side of the fence. Besides, when a farm is fenced on one side it requires just that much less exercise of muscle and outlay of money to complete an entire enclosure, which is generally necessary to the proper cultivation of the tract. Every rod of partition fence added to a tract of land which is under cultivation and is intended for cultivation adds that much to the value of the farm. It is no argument for the landowner to say that because he does not want a fence, and will take all chances from straying livestock, the fence will be of no benefit or value to his land. Except in cases where the partition fence will be of no benefit, as when the land is wild and uncultivated and is to remain so, the owner must build his fences whether he regards them as of any benefit or not.[30]

The court concluded that where land is cultivated (in other words, used for an agricultural purpose) and adjoined by land occupied by livestock, the cultivated land is presumed to benefit from the enclosure. Furthermore, the decision of benefit is not a subjective one to be made by the crop-farming landowner.

In 1969, the Supreme Court of Ohio considered the state's partition fence statute in *Glass v. Dryden*,[31] and determined that the statute was constitutional, even where one of the adjoining properties was not used for any type of agricultural purpose. Glass owned two parcels of real estate in Huntington Township, Ohio, neither of which was used for agricultural purposes. Her neighbor, Cooper, also owned real estate in the Township and utilized his property for agricultural purposes, as well as the raising of cattle. Cooper desired to construct a new fence between their properties and, pursuant to Ohio's cost-share provision, sought financial contribution from Glass. Glass felt she would not benefit from the fence because her property was not used for agricultural purposes and was in the process of being divided into lots for residential and recreational purposes.

The Trustees of Huntington Township viewed the property and made an assignment requiring each of the parties to share equally in the construction and maintenance of the fence. Glass subsequently commenced an action, seeking an injunction.

The court denied Glass' petition to enjoin the Township from proceeding on their order. A further appeal to the Court of Appeals of Ohio resulted in the appeals court reversing the trial court and granting an injunction to Glass. The case was ultimately heard by the Ohio Supreme Court.

The Supreme Court of Ohio reversed the appeals court and decided that the trial court had been correct in denying the injunction. The court analogized the order to build and maintain half of the fence to a special assessment against real property and determined that, given a public improvement of some nature, both properties received a benefit. The court stated:

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[30] *Id.*

[31] 248 N.E.2d 54 (Ohio 1969).

> True, a partition fence is not a public improvement in the sense that the public uses it directly. Yet, as Judge Johnson conceded in Zarbaugh, the extent that '(t)he annoyance and inevitable trespassing upon adjoining fields and crops which would result from the absence of a fence' is prevented, the fence inures to 'the ulterior public advantage.' And, to the extent that the advantage inures to private property immediately adjacent to the fence, some benefit thereto may be presumed until the contrary is shown. Even in this case it appears that [Glass] has been vexed by damage from her adjoining owner's cattle straying onto her premises.[32]

Although the Ohio statute contained an exception where the adjoining land was "laid out into lots," the court held that Glass failed to meet the exception or prove that her land would not be benefited by the addition of the fence.[33] Even though an agricultural use was not contemplated by the delinquent landowner, until the land was laid out into lots, the statutory exception was not applicable. A benefit to the landowner was presumed, and the statute was thus found constitutionally valid.

Iowa courts examined the state's partition fence statute in *Gravert v. Nebergall*.[34] There, the Iowa Supreme Court found the statute constitutional in application to adjoining landowners using the land for agricultural purposes.

The Graverts lived just within the city limits of Tipton, Iowa, and owned 12 acres of land, nine of which were leased out for crop farming. The Nebergalls were neighbors to the Graverts but lived just outside the city limits of Tipton in Center Township on 25 acres of land, most of which was used for raising miniature horses. A fence formerly existed between the two properties, dividing as well the City and Township, but it had fallen into disrepair. A dispute arose when the Nebergalls requested that the Graverts share in the cost of constructing and maintaining a new partition fence. When the Center Township trustees, acting as fence viewers, ordered both the Graverts and the Nebergalls to maintain separate portions of the fence, the Graverts appealed.

The trial court found in favor of the Graverts, holding that application of the law requiring forced contribution by both neighbors in the construction and maintenance of the partition fence was generally authorized by law but was unconstitutional under the circumstances presented here. The court stated:

> [A] partition fence between abutting landowners, one rural and suited or used for the raising of livestock and the other city and prohibited from such use, confers no benefit to the latter and provides the former with a specific benefit unrelated to any legitimate governmental interest,

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[32] *Id.* at 56.

[33] *Id.* at 56-57.

[34] 539 N.W.2d 184 (Iowa 1995).

> particularly in light of the underlying obligation of the livestock raiser to protect the general public from his animals.[35]

The trial court concluded that the application of the partition statute to the facts before it violated the Fifth and Fourteenth Amendments to the United States Constitution, as well as, similar provisions in the Iowa Constitution.

The Iowa Supreme Court disagreed, indicating that the police power of the state was sufficient to authorize such legislation. The court found that while other jurisdictions were split on the issue, it was persuaded that even though the livestock owner would be the primary beneficiary under the law, benefits would also inure to the non-livestock owner neighbor. The court held that the fence law was reasonably necessary to further a variety of legitimate public interests, and quoted with approval the same factors cited by the trial court in *Choquette v. Perrault*.[36]

The court noted that to properly comply with constitutional law, benefits need not be distributed between the parties equally. Noting that compliance with the fence law would undoubtedly require the Graverts to expend substantial sums of money, the court found that "a law does not become unconstitutional merely because it works a hardship."[37] Finally, the court observed that should its decision appear oppressive or unfair, the appropriate venue for change would, of course, be the state legislature.[38]

A Minnesota court considered a constitutional challenge to its forced-share partition fence statute in *In re Bailey*.[39] Relying heavily on the *Glass* decision, the court ruled in favor of the party seeking contribution.

Bailey owned approximately 500 acres of land used for cervidae (deer) farming. The Feldmans owned property adjoining Bailey's property. It is unclear from the opinion for what purpose the Feldmans' property was used. Bailey sought to construct a fence around his property and asked for contribution from the Feldmans pursuant to the Minnesota statute.

The County Commission charged with implementing the Minnesota fence law determined that it was appropriate to require the Feldmans to contribute toward the construction and maintenance of the fence. Ultimately, it was determined by the appointed fence viewers that, to keep the cervidae confined, a fence 96 inches tall was required, to which the Feldmans were required to contribute.

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[35] *Id.* at 186 (quoting trial court).

[36] *Id.* at 188 (citing *Choquette*, 569 A.2d 455, 457-58 (Vt. 1989)).

[37] *Id.* (citations omitted).

[38] *Id.*

[39] 626 N.W.2d 190 (Minn. Ct. App. 1990).

On appeal by the Feldmans, the Commission's orders were affirmed. The Court of Appeals of Minnesota held that contribution required under the fence law of Minnesota was reasonably necessary to achieve the public purpose of confining animals, was not unduly oppressive to adjoining landowners, and accordingly, a valid exercise of the police powers of the state. The court quoting from the case *Glass v. Dryden* stated:

> We find the reasoning in *Glass* persuasive. [The Feldmans] have asserted that the partition fence between their property and Bailey's property will not benefit their property. In fact, [the Feldmans] argue that their property will be adversely affected, because the fence will restrict wildlife movement in the area. [The Feldmans] have not presented any evidence in support of these assertions. We find that [the Feldmans] will be benefited in several ways by the application of Minnesota's partition fence statue including freedom from intrusion by neighboring livestock and increased privacy. Given these benefits, we find that Minnesota's partition fence law is not unduly oppressive. . . .[40]

Thus, as in Ohio and Iowa, Minnesota found benefits flowing from the construction of partition fences between rural landowners sufficient to justify the application of the statute.

2. Statutes Held Invalid As Applied

A New York court considered the constitutionality of its partition statute in *Sweeney v. Murphy*[41] in 1972. The court found the statute unconstitutional in its application to a landowner who, while utilizing part of his land in an agricultural capacity, did not keep livestock. As a result, the statute was not reasonably necessary to further any legitimate public purposes and was therefore an oppressive and unconstitutional application of the statute.

The Murphys owned 158 acres of rural New York land on which they kept no livestock and tilled a mere 10 acres. The property was abutted on the north and east by 200 acres owned and operated as a dairy farm by Sweeney. Sweeney grazed approximately 110 milking cows on the land. The New York statute in effect at the time contained a shared-cost provision: "Each owner of two adjoining tracts of land . . . shall make and maintain a just and equitable portion of the division fence between such lands, unless both of said adjoining owners shall agree to let their lands lie open, along the division line . . . ."[42]

The statute thereby obligated the Murphys to maintain (as the fence existed but was in a state of disrepair) one-half of the 2,200 foot section of fence dividing the plaintiffs' and

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[40] *Id.* at 196.

[41] 334 N.Y.S.2d 239 (N.Y. App. Div. 1972), *aff'd.*, 294 N.E.2d 855 (N.Y. 1973).

[42] *Id.* at 241 (referring to Section 303 of the Town Law).

defendants' property. The Murphys refused to repair or maintain their part of the fence and instituted an action to have the statute declared unconstitutional.

At the trial court level, the Murphys' motion for summary judgment and Sweeney's motion for dismissal were denied. On appeal, the court granted the Murphys' motion for summary judgment, finding that the statute was not reasonably necessary to a legitimate purpose and was thus unconstitutional.

In reaching its decision, the court reiterated the long-established presumption in favor of the validity of legislative enactments and the fact that it was loathe to strike down a law as unconstitutional unless the invalidity of the law was established beyond a reasonable doubt. The court went on to say that any intrusion by the state into the liberties of individuals under the police power granted to the state must bear "a reasonable relationship to, some proportion to, the alleged public good on account of which this restriction on individual liberty would be justified."[43] The test used in determining the legitimacy of the state action was laid down in *Lawton v. Steele*: "it must appear – First, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals."[44]

In summarily striking down the law as unconstitutional in its application to the plaintiffs, the court indicated that under this test, while the law may have served a valid purpose at one time, it no longer served a legitimate state interest. Accordingly, the court held that the law was arbitrary and confiscatory, and would deprive the plaintiffs of their property for an item they neither needed nor wanted.

In 1989, the Supreme Court of Vermont considered its own partition fence statute in *Choquette v. Perrault*[45] and reached a similar result. The applicable portion of the Vermont statute provided that "owners ... of adjoining lands, where adjoining lands are actually occupied, are responsible for making and maintaining 'equal portions' of the division fence between their lands."[46]

The Choquettes were dairy farmers and grazed approximately 265 milking cows on a 310-acre pasture. Their property abutted the Perraults' property, which consisted of 50 wooded acres not used for farming purposes. Because the fence between the properties was in disrepair, the Choquettes' cows repeatedly escaped onto the Perraults' land. To alleviate the problem, the Choquettes requested that the Perraults rebuild an 850 foot portion of the fence. The Perraults refused the request. The Choquettes made the repairs themselves and subsequently sought to recover their expenses from the Perraults.

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[43] *Id.* (relying on Fenster v. Leary, 229 N.E.2d 426, 429 (N.Y. 1967)).

[44] *Id*

[45] 469 A.2d 455 (Vt. 1989).

[46] *Id.* at 457 (referring to 24 V.S.A. § 3802).

At the trial court level, judgment was for the Choquettes. Rejecting *Sweeney v. Murphy*[47] and relying on the rational basis standard, the trial court determined that the Vermont statute imparted benefits sufficient to make it neither arbitrary nor capricious. Those benefits included:

(1) Freedom from unwanted intrusion by a neighbor's cattle.
(2) Freedom from trespassing neighbors and an increase in privacy.
(3) Elimination of "devil's lanes," unoccupied spaces between separate fences constructed by hostile neighbors.
(4) Diminution of lawsuits arising out of damage caused by straying cows.
(5) Discouragement of litigation by clearly marking the boundaries of rural lands.
(6) Increase in value of all land by fostering the continued vitality of agriculture.[48]

On appeal, the Supreme Court of Vermont considered both *Sweeney v. Murphy* and *Glass v. Dryden* and found:

> The test, then, in determining a law's constitutionality under Article 7 when no fundamental right or suspect class is involved, is whether the law is reasonably related to the promotion of a valid public purpose. Employing this standard of review, we hold that [the partition fence statute] is unconstitutional as applied to persons who own no livestock.
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> Notwithstanding the trial court's effort to identify potential benefits accruing to the public and to adjoining landowners without livestock, the simple truth is that the fence law was enacted primarily to benefit landowners with livestock.
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> ...
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> The argument that a landowner without livestock benefits to the extent that he or she is protected by straying livestock is delusive, considering the fact that, absent the statute, the liability for trespassing livestock lies solely with the owner of the livestock.[49]

V. Survey of Current Partition Fence Statutes in the Midwest

The authors have identified three categories of partition fence statutes currently in place in the Midwest: livestock provisions, agricultural provisions, and "without regard to use" provisions. The former seems more likely than the latter to survive constitutional challenges, especially in the light of the changed rural landscape. To understand the affect of these statutes on adjoining landowners, it is important to remember that in each

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[47] 334 N.Y.S.2d 239 (N.Y. App. Div. 1972).

[48] 469 A.2d at 457 (quoting the lower court's decision).

[49] *Id.* at 459.

of the Midwestern states, fencing-in is the rule and, generally, liability for damage by straying livestock is attached to the owner of the livestock.

A. Livestock Provisions

The category of partition fence statutes most likely to survive a constitutional challenge are those that require cost-sharing only where at least one of the parties raises livestock on his property, such as the situation described in Examples 1 and 2 above.[50] Many of the cases involving partition fences where at least one of the landowners has livestock speak to the benefits accruing to the each of the landowners. These benefits have been found sufficient to support the cost-sharing provisions of these statutes.

Missouri

Missouri amended its fence law on August 28, 2001. The new law, inter alia, provides that forced contribution is required only if the neighboring landowner also has livestock placed against the division fence.[51] In other words, property owners cannot be forced to pay for the construction or maintenance of a fence if they do not have livestock placed against that fence at the time of construction. If the property owner subsequently decides later to place livestock against the fence, he is generally responsible for paying half of the construction cost to his neighbor.

Procedurally, the livestock owner builds the fence with his own money and then records the bill with the circuit judge, who then records it on both landowners' deeds. If the neighbor decides later to place livestock against the fence, he is generally responsible for paying half the construction cost to his neighbor.

The new law does not apply in all Missouri counties. Certain counties previously adopted a local option that requires that neighbors can be forced to contribute to one-half the building and maintenance of a boundary fence as long as one or the other has need for it, even if livestock is against neither side.[52]

Michigan

Michigan law requires that only the landowner who constructs the fence is required to pay for its construction and maintenance.[53] The adjoining landowner (or tenant of the landowner) is not required to contribute to those costs unless and until such time as he

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[50] *See supra* Part II, at p.2.

[51] MO. REV. STAT. § 272.060.

[52] Fourteen Missouri counties currently observe the local option: Bates, Clinton, Daviess, Harrison, Knox, Linn, Mercer, Newton, Putnam, Schuyler, Scotland, Shelby, St. Clair, and Sullivan.

[53] MICH. COMP. LAWS § 43.53(1) ("The owner of real property who constructs a fence shall pay for the construction and maintenance of that fence").

subsequently begins to use the fence for restraining or containing animals.[54] At that time, the adjoining property owner must compensate his neighbor who constructed the fence for his own "proportionate share of the current value of the fence."[55] Alternatively, the adjoining property owner may build his own fence.[56]

South Dakota

In South Dakota, landowners are generally liable for one-half of the expense of erecting and maintaining a partition fence between their properties. However, no forced-contribution is required of either owner "if neither keeps livestock on the affected tract of land and neither derives any substantial benefit from the fence for a period of five years from the date of erection or repair of the fence.[57]

South Dakota's right-hand rule is statutorily delineated. Unless adjoining landowners otherwise agree, if a partition fence is required, "each owner of adjoining lands shall build that half of the fence which shall be upon his right hand when he stands upon his own lands and faces the line upon which the proposed fence is to be built."[58]

B. Agricultural Provisions

This category of statutes requires cost sharing when one of the properties is used for any type of farming or agricultural purpose. Generally, and for the purpose of this paper, agricultural use includes the raising of livestock or the growing of trees or crops for sale. As discussed above, when liability for straying cattle is on the owner, the benefit of the partition fence to the adjoining crop farmer or non-farming landowner is barely perceptible. In the case where neither landowner has livestock against the fence, but one farms the land, such as in Examples 3 and 4,[59] the benefit to the other crop farmer or non-farming landowner is non-existent.

Wisconsin

Wisconsin law, which applies in agricultural areas, provides that if either adjoining property of two neighbors is used for farming or grazing, and unless the landowners otherwise mutually agree, a partition fence is required. The terms *farming* and *grazing* are not statutorily defined. The neighbors share the cost of building and maintaining the fence. "The respective occupants of adjoining lands used and occupied for farming or

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[54] *Id.* at § 43.53(2).

[55] *Id.*

[56] *Id.*

[57] S.D. CODIFIED LAWS § 43-23-1.

[58] *Id.* at § 43-23-2.

[59] See *supra* part II, at pps. 2-3.

grazing purposes, and the respective owners of adjoining lands when the lands of one of such owners is used and occupied for farming or grazing purposes, shall keep and maintain partition fences between their own and the adjoining premises in equal shares so long as either party continues to so occupy the lands [. . . .][60]

Wisconsin's partition fence law applies when subdivisions lie next to agricultural land and Wisconsin law specifically authorizes town boards to require subdividers to construct half of the fence on subdivision land adjoining land used for farming or grazing as a condition of plat approval by the town.[61] Absent such a requirement, the individual landowners are responsible for their portions of the partition fence.

A Wisconsin attorney general opinion addressed the issue of whether the owners of adjoining lands (one used for farming purposes and the other for forest crop lands) can be compelled to share in the cost of erecting and maintaining a partition fence.[62] The attorney general concluded that: "It is the opinion of this office that under the provisions of the statute . . . the owner of lands adjoining other lands which are used and occupied for farming purposes must share in the maintenance of the partition fences, whether or not the lands first mentioned are forest croplands."[63]

Indiana

Indiana amended its fence law in 2003 to essentially provide that the duty to build and maintain partition fences does not apply to a fence separating two adjoining parcels of property unless at least one of the adjoining parcels is agricultural land.[64] Agricultural land is statutorily defined as land that is (1) zoned or otherwise designated as agricultural land, (2) used for growing crops or raising livestock, or (3) reserved for conservation.[65] Previously, compelled contribution was the rule regardless of use.[66]

C. Without Regard to Use Provisions

In some states, forced-contribution is required regardless of how the land on either side of the fence is used. These types of statutes would be the least likely to pass constitutional muster, since the rationale for constructing the fence is indiscernible. Perhaps, for that reason, a number of states with "without regard to use" provisions

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[60] WIS. STAT. § 90.03.

[61] *Id.* at § 90.05(2).

[62] 24 Op. Att'y. Gen. 128 (1931).

[63] *Id.*

[64] IND. CODE § 32-26-9-2.

[65] *Id. at* § 32-26-9-0.5.

[66] *Id.* at § 32-10-9-2 (repealed).

statutorily allow for exceptions to the general rule of forced-contribution under certain circumstances.

Iowa

In Iowa, the current statute provides that "the respective owners of adjoining tracts of land shall upon request of either owner be compelled to erect and maintain partition fences, or contribute thereto, and keep the same in good repair [. . . .][67] As noted above, in *Gravert v. Nebergall*,[68] the Iowa Supreme Court found the statute constitutional in application to adjoining property owners, one of whom raised miniature horses and the other crops. Whether the court would reach a similar result in a case not involving agricultural activities is less certain.

Illinois

In Illinois:

> When any person wishes to inclose his land, located in any county having less than 1,000,000 population according to the last preceding federal census and not within the corporate limits of any municipality in such county, each owner of land adjoining his land shall build, or pay for the building of, a just proportion of the division fence between his land and that of the adjoining owner and each owner shall bear the same proportion of the costs of keeping the fence maintained and in good repair.[69]

The "just proportion" language in the statute ameliorates the apparent harshness of the "without regard to use" type statutes. In In re Wallis,[70] for example, a landowner without livestock lived in a nursing home and was on public aid. The fence viewers ordered the neighboring landowner, who wanted to run livestock on the adjoining property, to assume the responsibility of maintaining the entire partition fence. The fence viewers determined that the nursing home-bound landowner would receive no benefit from the fence and therefore required him only to keep brush back three feet from his side of the fence.

The adjoining landowner contended that the Illinois statute required landowners to equally divide the cost of maintaining a fence if they could not agree on appropriate

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[67] IOWA CODE § 359A.1A.

[68] Gravert v. Nebergall, *supra* notes 34-38 and accompanying text. *See also* Sinnot v. District Court, 207 N.W. 129, 131 (Iowa 1926). Ironically, as this case points out, prior to amendment, the statute specifically required forced-contribution only where each owner derived a benefit or revenue from his land.

[69] 765 ILL. COMP. STAT. 130/4.

[70] In re the Estate of Wallis, 559 N.E.2d 423 (Ill. App. 1995).

proportions. Upon finding the statutory language unambiguous, the court determined that the nature of the "just proportion" phrase "indicates its intended flexibility so as to be able to consider the circumstances in each individual case."[71]

> Allocating the costs of maintaining a fence between adjacent landowners on an equal basis would result in undue hardship in certain cases. For example, a parcel of one acre owned by an individual on a fixed retirement income who merely homesteads on the parcel might be located adjacent to a 1,000-acre parcel owned by a wealthy agribusiness engaged in livestock production. The homesteader should not be required to evenly split the cost of a section of high-tech fence built by the agribusiness to divide its parcel from the homesteader's parcel.[72]

Nebraska

The rule in Nebraska is as follows: "When two or more persons shall have lands adjoining, each of them shall make and maintain a just portion of the division fence between them; PROVIDED, HOWEVER, this shall not be construed to compel the erection and maintenance of a division fence where neither of the adjoining landowners desires such division fence."[73]

There do not appear to be any recorded cases of constitutional challenges to the Nebraska statute; however, one would suspect that if challenged, reference might be made to Illinois cases interpreting the "just proportion" clause.

Minnesota

Generally, Minnesota law requires a forced contribution by an adjoining landowner where the land is "improved and used," regardless of the type of use. "If all or a part of adjoining Minnesota land is improved and used, and one or both of the owners of the land desires the land to be partly or totally fenced, the land owners or occupants shall build and maintain a partition fence between their land in equal shares."[74] No explanation is provided on what constitutes a sufficient improvement and use; however,

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[71] *Id.* at 428.

[72] *Id.*

[73] NEB. REV. STAT. § 34-102.

[74] MINN. STAT. § 344.03. *See also* Rice v. Kringler, 517 N.W.2d 606, 608 (Minn. App. 1994). *But see* MINN. STAT. § 383C.809 (exempting certain St. Louis County landowners who do need partition fences from the requirements of the fence law), MINN. STAT. § 344.011 (allowing town boards to pass a resolution exempting adjoining properties from the obligations of the fence law when those lands, when taken together, contain less than 20 acres), and MINN. STAT. § 344.20 (providing and option for towns to adopt their own fence law policies).

the Minnesota Court of Appeals has held that pasturing cattle is a sufficient improvement and use under that statute.[75]

Minnesota courts have upheld the constitutionality of the state's partition fence law. Most recently, the Court of Appeals in *In re Bailey,*[76] reaffirmed the constitutionality of the law. "We believe it is clear that the partition fence law serves the broad purposes of mediating boundary, fence, and trespass disputes by requiring adjoining landowners to share the cost of a partition fence."[77] The court adopted a position similar to that in Ohio, presuming the adjoining property owner is benefited by the fence, unless he can prove sufficient evidence to the contrary.[78]

North Dakota

In North Dakota, forced contribution is generally the rule: "The occupants and coterminous owners of lands inclosed with fences are mutually and equally bound to maintain the partition fences between their own and the next adjoining enclosures unless one of such owners chooses to let his land lie open."[79]

"When unenclosed ground is enclosed, the owner or occupant thereof shall pay one-half of the value of each partition fence standing upon the line between his land and the enclosure of any other owner or occupant."[80]

If a person shall determine not to fence any of his lands adjoining a partition fence . . . he shall not be required to maintain any part of the fence during the time his lands are open.[81]

Kansas

The Kansas statute provides that:

> No person not wishing his land enclosed, and not occupying or using it otherwise than in common, shall be compelled to contribute to or erect or maintain any fence dividing between his land and that of an adjacent

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[75] Brom v. Kalmes, 230 N.W.2d 69 (Minn. 1975).

[76] 626 N.W.2d 190 (Minn. Ct. App. 2001).

[77] *Id.* at 195.

[78] *Id.* at 196.

[79] N.D. CENT. CODE § 47-26-05.

[80] *Id.* at § 47-26-16.

[81] *Id.* at § 47-26-17.

> owner; but when he encloses or uses his land otherwise than in common, he shall contribute to the partition fence.[82]

By its language, and in the opinion of the Kansas attorney general, two conditions must be satisfied before the statute applies: the land must be used "in common," and the complaining landowner does not want the fence. Unfenced tracts are not used in common when they are used for different purposes (i.e., crop raising and cattle grazing). Thus, when a crop farmer (or other non-livestock owner) adjoins a livestock owner (as in Example #2, above), or when a crop farmer adjoins a non-agricultural use landowner (as in Example #3, above) both adjoining landowners must contribute an equal share to the building or maintaining of a partition fence because the tracts are not used in common.[83]

Ohio

In Ohio, if one landowner wants to construct a partition fence, the neighboring landowner must share equally in the cost of building the fence. Specifically, the law states that "[t]he owners of adjoining lands shall build, keep up and maintain in good repair, in equal shares, all partition fences between them...."[84] The law appears harsh when examined from the perspective of a landowner who doesn't plan to use the fence. But in Ohio, with a few exceptions, a landowner must share in the costs even if she is not a farmer, does not have livestock, or never intends to use the fence. The fence law clearly states: "The fact that any land or tract of land ... is not used, adapted, or intended by its owner for use for agricultural purposes shall not excuse the owner thereof from the obligations imposed by this chapter...."[85]

However, the Ohio Supreme Court has developed an exception to the partition fence law that addresses the perceived unfairness of the law. The duties are extinguished "if the cost to build or maintain the fence 'exceed[s] the difference between the value of the land before and after the repair or construction of the fence.' In other words, if the cost of construction, maintenance, or repair of a partition fence exceeds the beneficial value of the fence to one of the adjoining landowners...."[86]

VI. Conclusion

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[62] KAN. STAT. ANN. § 29-309.

[83] *See* Kan. Att'y Gen. Op. No. 83-43 (Mar. 25, 1983) and 87-28 (Feb. 16, 1987). *See also* ROGER A. MCEOWEN, KANSAS STATE UNIVERSITY (C-663), KANSAS FENCE LAW (Apr. 2004).

[84] OHIO REV. CODE ANN. § 971.02.

[85] *Id.*

[86] Hickory Grove Golf Club, Inc. v. Hedrick, No. 2002-A-0031, 2003 WL 21750632, at *4 (Ohio Ct. App. July 25, 2003).

Historically, most fence laws were written to facilitate the competing interests of an agricultural society. As the court stated in *Choquette*:[87]

> In the context of the land-use patterns of the nineteenth century, Vermont's fence law served the broad public interest. Though not all Vermonters were engaged in agricultural pursuits, the land was predominantly open and farmed, and most rural landowners were also livestock owners. This is not the case today. Much of the open farmland that existed at the turn of the century has reverted to woodlands or otherwise been developed. We can no longer assume that the fence law affects livestock owners almost exclusively. As a result of changing land-use patterns, the law more and more often applies to landowners without livestock. In such situations, the fence law is burdensome, arbitrary and confiscatory, and therefore cannot pass constitutional muster.[88]

Do good fences make good neighbors? In his poem *Mending Wall*, Robert Frost and his neighbor used their land to raise apple and pine trees, respectively. Frost's neighbor thought the fence a good idea, but Frost was not convinced:

> There where it is we do not need the wall:
> He is all pine and I am apple orchard.
> My apple trees will never get across
> And eat the cones under his pines, I tell him.
> He only says, "Good fences make good neighbours."[89]

Perhaps, as time goes by, more and more courts and legislatures will be persuaded by these realities, and the above-mentioned conclusion will be embraced. The New York and Vermont cases cited herein appear to confront the changing face of rural America, while the other court decisions discussed seem to cling to an out-of-date view of our rural environment and, like Frost's neighbor, a questionable rationale for fence-building. Only time will tell which will ultimately prevail.

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[87] 569 A.2d. 455 (Vt. 1989).

[88] *Id.* at 460.

[89] ROBERT FROST, MENDING WALL (North of Boston, 1915).

Appendix A

STATE	Farms number 1952	Land in Farms acres 1952	Farms number 2002	Land in Farms acres 2002	% change farms number	% change acres number
Illinois	192,000	31,600,000	76,000	27,700,000	-66.6	-12.3
Indiana	162,000	19,900,000	63,000	15,400,000	-61.3	-22.7
Iowa	203,000	34,900,000	92,500	32,600,000	-54.6	-6.6
Kansas	129,000	50,500,000	63,000	47,400,000	-51.2	-6.1
Michigan	151,000	17,500,000	52,000	10,400,000	-65.7	-40.6
Minnesota	176,000	33,300,000	79,000	28,400,000	-55.2	-14.7
Missouri	222,000	35,600,000	107,000	29,800,000	-51.8	-16.3
Nebraska	105,000	48,300,000	52,000	46,400,000	-50.5	-3.9
N. Dakota	64,600	42,700,000	30,000	39,400,000	-53.7	-7.7
Ohio	192,000	21,000,000	78,000	14,700,000	-59.5	-30
S. Dakota	65,500	45,200,000	32,500	44,000,000	-50.5	-2.6
Wisconsin	165,000	23,500,000	77,000	15,900,000	-53.4	-32.3
Total	**1,827,100**	**404,000,000**	**802,200**	**352,100,000**	**-56.1**	**-12.8**